No. 82-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

v.

ESTHER WUNNICKE ~~ROBERT LEResche~~, COMMISSIONER OF DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF ALASKA, *et al.*,
Respondents,

KENAI LUMBER CO., INC.
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

A. The Decision Below Is Of Great Practical Importance To The Timber Industry In All The Western States And To State Control Over Natural Resources Generally.

Respondents' attempt to characterize the decision below as limited to its "unique set of facts" (Br. in Opp. at 17) completely ignores the immediate practical effect of the decision below on the timber industry and the serious risk that the Ninth Circuit's unprecedented "implicit consent" theory will encourage other resource-rich states to enact similar protectionist legislation. Indeed, the Oregon experience provides a concrete illustration of what is likely to happen in other jurisdictions if the decision below is left

standing. Oregon, like Alaska, has a statute that prohibits the export of unprocessed logs into foreign commerce. (Or. Rev. Stat. § 526.805; Pet. App. at 37a-38a.) Prior to the decision below, the constitutionality of the Oregon statute had been questioned by the State Attorney General,[1] and, therefore, had not been enforced. Since the decision below, the export ban has been effectively reinstated.[2] Consequently, some 926,000 acres of timberland in Oregon are once again subject to the Oregon export ban. (*See* Pet. App. at 54a.)

Nor is the problem restricted to Oregon. As the petition shows, the timber industry already faces statutes restricting the export of unprocessed logs in three other western states, and the threat of similar restrictions in another. (Pet. at 14-15.) Thus, even if the Ninth Circuit's decision were capable of being read as restricted only to the timber industry, its detrimental impact would be substantial.

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[1] The Oregon Attorney General had concluded that the state export ban was "probably unconstitutional." (*See* Pet. App. at 42a.) In particular, the Attorney General concluded: "Oregon, we believe, may not [restrict the export of unprocessed logs from] its own lands, and Congress has not given it permission to do so." (*See* Pet. App. at 48a-49a.) The Attorney General relied in part on the district court decision in this case in reaching this conclusion. (*See* Pet. App. at 47a.)

[2] As a result of the Ninth Circuit's decision, the Attorney General revised his views on the constitutionality of the Oregon export ban. In a letter to the State Forester, the Attorney General, while noting that there are "substantial grounds for a United States Supreme Court challenge to the Ninth Circuit decision," concluded: "there is no present basis upon which to conclude that the courts would find the Oregon statutes to be invalid." (*See* Reply Br. App. at 1a.) Significantly, the constitutionality of the Oregon restraint is currently the subject of litigation. *See Bohemia Inc.* v. *Oregon*, No. 82-1200 (Coos County Cir. Ct. filed June 25, 1982). In addition, as explained in the petition, there is considerable confusion in the Oregon legislature as to the scope of the Ninth Circuit's decision. (*See* Pet. at 15.)

As a matter of fact, however, the Ninth Circuit gave no indication whatsoever that its aberrant "implicit consent" theory was limited to the precise facts presented, as respondents would have this Court believe. States have often sought to justify such protectionist legislation by claiming—until now unsuccessfully—that the federal government had given "implicit consent" to the state action. *See, e.g., New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980). Other states have enacted restrictions on exporting other natural resources (*see* Pet. at 16); the decision below—with its indeterminate "implied consent" theory—is likely to provide support for other attempts to enact similar discriminatory legislation.

B. The State Restraint At Issue Has A Substantial Impact On Foreign Commerce.

Respondents' assertion that Alaska's primary manufacture requirement "has no significant impact on foreign commerce" (Br. in Opp. at 6) is inconsistent with the district court's uncontroverted findings. As respondents admit, the state owns approximately 21% of the commercial timberland in Alaska. (Br. in Opp. at 16 n.10.)[3] Furthermore, exports account for over 90% of the sales of Alaskan timber products. (Pet. at 3 n.2.) Thus, the decision below clearly authorizes the state to restrain foreign commerce to a significant degree. As the district court

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[3] Respondents attempt to underplay the practical market impact of Alaska's export prohibition by asserting that the state is "only one of many owners of commercial timber land in Alaska. . . ." (Br. in Opp. at 13.) This is disingenuous, at best. As the respondents point out (Br. in Opp. at 16 n.10), Alaska owns approximately 21% of the commercial timberland in the state, which means that the state owns over eight times the amount of commercial timberland owned by all private parties. (*See* Pet. App. at 54a.)

specifically found: "the primary manufacture requirement places a substantial rather than an incidental burden on commerce." (511 F. Supp. at 143; Pet. App. at 15a.)

Respondents' argument that foreign trade is no more limited than it would be if the state had decided not to sell its timber at all is similarly flawed. A state cannot *discriminate* against constitutionally protected commerce. Indeed, if respondents' argument were valid, a state-owned restaurant could justify racial discrimination on the ground that those discriminated against were no worse off than they would be if the restaurant simply closed its doors. Of course, the restaurant may close its doors, but if it is open for business its practices must comply with the Fourteenth Amendment. Similarly, a state may decide not to sell its timber; once it makes sales, however, it must comply with the Commerce Clause.

Finally, respondents' contention that "the impact of Alaska's primary manufacture requirement on foreign commerce is significantly less than the impact of the congressionally approved federal processing requirements" (Br. in Opp. at 15-16) is irrelevant. More importantly, this contention ignores the fundamental distinction between federal and state regulation of foreign commerce. It is one thing for the federal government—the political body with responsibility for foreign policy—to impose a restraint on foreign commerce, even at the price of injuring diplomatic relationships with foreign nations. It is quite another thing for an individual state, acting solely to protect local economic interests, to place a substantial restraint on foreign commerce. The

constitutional impropriety of Alaska's interference with a sensitive federal function is clear.[4]

C. The Ninth Circuit's "Implicit Consent" Theory Is Inconsistent With Prior Decisions Of This Court Requiring Express Federal Approval Of State Action That Would Otherwise Violate The Commerce Clause.

Respondents rely heavily on this Court's recent decision in *White* v. *Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1983), to support their "implicit consent" theory. This reliance is based on a transparent revision of this Court's holding in *White*. Contrary to respondents' argument, this Court did not rely on "general congressional statements of policy" (Br. in Opp. at 9) in upholding the executive order at issue in *White*. Rather, this Court found *specific federal approval*, noting specifically that "the federal regulations for each program affirmatively permit[ted] the type of parochial favoritism expressed in the order." 103 S. Ct. at 1047.[5]

Similarly, respondents assert that "[a]lthough the court of appeals did not cite it as precedent, *Parker* v. *Brown*, 317 U.S. 341 (1943), also supports the decision in this case." (Br. in Opp. at 10 n.5.) The Ninth Circuit had good cause for not relying on *Parker*. There, unlike here, the United States Secretary of Agriculture had affirmatively cooperated in promoting the state program and aided it through substantial federal loans. In *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1949), this

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[4] As this Court stated in discussing the Import-Export Clause: "the Federal Government must speak with one voice when regulating commercial relations with foreign governments. . . ." *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976).

[5] The Court set forth the pertinent federal regulations which "affirmatively sanctioned" the Mayor's order. *See* 103 S. Ct. at 1047 n.11.

Court made clear that such affirmative expressions of federal approval are essential if state actions otherwise inconsistent with the Commerce Clause are to withstand constitutional scrutiny. As this Court stated: "It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity." *Id.* at 543.[6]

Neither respondents nor the Ninth Circuit have ever explained how the federal government has, in any way, expressed its approval of the *State of Alaska's* restraint on interstate and foreign commerce.[7] There has been no answer to the district court's conclusion that "[a]n examination of the relevant statutory provisions shows that Congress has not consented to any primary manufacture requirements imposed *by the states*." (511 F. Supp. at 141; Pet. App. at 12a)(emphasis added). Consequently,

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[6] In *Hood*, this Court held invalid a New York restraint on commerce intended to protect and advance local economic interests. The Court distinguished *Parker* in this fashion: "Another element in the *Parker* case which led the Court to sustain the California regulation was that it was one which the policy of Congress was to aid and encourage, and the Secretary of Agriculture had approved the State program by loans." 336 U.S. at 537. "There is no such financial support [here] as was given in *Parker* v. *Brown*, 317 U.S. 341." *Id.* at 542.

[7] Respondents' argument that Alaska's primary manufacture requirement is justified because it is a continuation of federal timber policy that preexisted Alaska's statehood is meritless. It is well-established that new states enter the Union on an "equal footing" with other states. *See, e.g., United States* v. *Texas*, 143 U.S. 621, 634 (1892); *Escanaba Co.* v. *Chicago*, 107 U.S. 678, 689 (1883). Thus, absent an affirmative expression of federal approval for the *State of Alaska* to undertake the protectionist activity in question, Alaska has no greater authority to ignore the negative implications of the Commerce Clause than any other state.

Alaska's export ban runs afoul of the fundamental Commerce Clause concern that "a legislature representative of the people whose significant interests are affected . . . [have] made the decision [in question]." O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 Or. L. Rev. 395, 400 (1982).

D. The Market Participant Exemption Does Not Apply When A State Seeks To Attach Conditions To The Use Or Disposition Of State-Owned Natural Resources It Sells In Commerce.

Respondents rely extensively on the market participant doctrine[8] in an attempt to justify Alaska's local processing requirement. This issue was not addressed by the Ninth Circuit. In any event, the market participant exemption is not available here, as the district court held. (511 F. Supp. at 143; Pet. App. at 14a.)

Despite respondents' protestations to the contrary, a state's ownership of a natural resource does not justify every protectionist measure associated with that resource.[9] Unlike the situation in *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), this case involves a natural resource, not "the end product of a complex process whereby a costly physical plant and human labor act on raw mate-

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[8] *See Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

[9] In *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), a privileges and immunities case, this Court made it clear "that the fact that a State owns a resource [does not], of itself, completely [remove] a law concerning that resource from the prohibitions of the Clause." *Id.* at 528. (This Court has emphasized that the Privileges and Immunities Clause and the Commerce Clause have a "mutually reinforcing relationship." *Id.* at 531.)

rials." *Id.* at 444.[10] Furthermore, Alaska is not acting as a market participant in the timber milling business—the business being protected. Instead, Alaska has attempted to use its prior ownership of the timber to extend a locational monopoly to a private party, Kenai Lumber Co., a local processor.[11] Moreover, the local processor is not subject to "active state supervision" in its dealings with timber owners such as petitioner. *Cf. California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

In sum, the market participant exemption is not available here. As the district court concluded: "While the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not 'attach conditions to the use or disposition of the resource that might independently burden interstate commerce. . . .' " (511 F. Supp. at 143; Pet. App. at 14a) (quoting Hellerstein, *Hughes* v. *Oklahoma: The Court, The Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 79 (1980)).

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, because the decision below is in direct

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[10] In *Reeves*, this Court distinguished the product there involved—cement—from "natural resources[s], like coal, timber, wild game, or minerals." 447 U.S. at 443. Here, the timber is "by happenstance," *id.* at 444, found within Alaska's borders. Furthermore, contrary to respondents' assertion (Br. in Opp. at 12), there is no evidence in the record to support its contention that "the state-owned timber in this case represents an investment of tax dollars." (*Id.*)

[11] As noted in the petition, the timber at issue here is located in a remote area, and the only available site to process the timber is a mill owned by Kenai Lumber Company, intervenor-respondent in this case. (*See* Pet. at 5 n.4.)

conflict with prior decisions of this Court, petitioner respectfully suggests that summary reversal would be appropriate.

Respectfully submitted,

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June, 1983

APPENDIX

OREGON ATTORNEY GENERAL'S LETTER OPINION

DEPARTMENT OF JUSTICE

Justice Building
Salem, Oregon 97310
Telephone, (503) 378-4400

December 14, 1982

H. Mike Miller
State Forester
Department of Forestry
1600 State Street
Salem, Oregon 97310

Dear Mr. Miller:

On February 23, 1982, we provided your office with a copy of our letter opinion OP-5216 dated February 19 to Representative Bugas, relating to export of logs from state lands. Our opinion stated that ORS 526.805 and 526.835 were probably unconstitutional, but we deferred a definitive conclusion because of a case then pending before the Ninth Circuit Court of Appeals.

The case of *South-Central Timber Development, Inc.* v. *Le Resche*, has now been decided by the Ninth Circuit. You have a copy of the opinion, issued December 10, 1982. The issues in that case, arising out of an Alaska log export ban, differed to some extent from the issues arising out of the Oregon statutes. However, the court sustained an Alaskan statute which was even more restrictive than the Oregon statutes. Accordingly, there is no present basis upon which to conclude that the courts would find the Oregon statutes to be invalid.

Counsel for the plaintiff in the *South-Central Timber Development* case inform us that no decision has been made whether to petition the United States Supreme Court for a Writ of Certiorari (review). We do see substantial grounds for a United States Supreme Court challenge to the Ninth Circuit decision, but we cannot predict whether a petition will be filed. Moreover, there is no basis to evaluate the chances of reversal

in the Supreme Court without an opportunity to review the appeal petition.

At this time, the Ninth Circuit decision must be treated as the law applicable to the states (including Oregon) included within its jurisdiction. This means that ORS 526.805 and 526.835 are within the authority of the State of Oregon to enact and enforce, and are valid except to the extent they apply to timber on Common School Fund lands. (Such timber will be further discussed below.)

ORS 526.805 requires timber (except white cedar) "sold by the State of Oregon, or any of its political subdivisions," to be primarily processed in the United States. ORS 526.835 makes it a *misdemeanor* to purchase or sell such unprocessed timber for delivery outside of the United States. ORS 526.815 to 526.825 formerly imposed certain responsibilities on the Department of Forestry with respect to export permits, but those statutes were repealed in 1981. The Department of Forestry thus may not sell logs under a contract requiring it to deliver outside of the United States. However, the Department of Forestry has no responsibility after sale for whatever disposition the purchaser makes of the logs. Responsibility to enforce ORS 526.835 rests entirely upon the district attorneys.

The department therefore *may* but is *not required* to insert a provision in its contracts requiring primary processing in the United States or otherwise referring to ORS 526.805 and 526.835. To the extent it does so, it undertakes a responsibility which is not required, and which is uncertain in its measurements. We have previously noted that it would be proper to delete such contract provisions and include them if the Oregon statutes are deemed valid. The point to be emphasized is that whether to include the clauses is a policy question. If such a clause is inserted, its breach (in addition to constituting a violation of law) may give rise to a right of the department to terminate the contract and, it could be asserted, to a duty to do so. There would probably be no recoverable damages. If department rules or the contract so provide, such a breach could

disqualify the purchaser from future contracts. If the department decides to include the provision, it should do so as a matter of policy, recognizing that it arguably thus takes on at least some investigative and enforcement responsibilities which the legislature intended district attorneys to bear. We must assume the legislature intended enforcement of the export ban to be the district attorney's responsibility when criminal sanctions were provided.

The department has no responsibility with respect to exports in violation of the statutes occurring before the Ninth Circuit decision was rendered. We also believe any prosecution for such exports would be inappropriate.

The department has the same responsibility with respect to unlawful exports occurring in the future as any private citizen or state agency. It is appropriate to call the attention of the appropriate law enforcement agency (in this case the district attorney) to any violation of law of which one becomes aware.

The department undoubtedly has entered into many contracts for sale of logs, since the date of our opinion OP-5216, in which the purchasers contemplated export of the logs notwithstanding ORS 526.805 and 526.835. We plainly stated that our opinion was preliminary and conditional. Our opinion concluded:

> "Whether in light of this opinion [a purchaser] is willing to [export state logs] is a matter for that purchaser to decide on the basis of its own counsel."

If purchasers contracted for purchase of logs, intending to export them, in reliance on our opinion and not on the opinion of their own counsel, they did so contrary to our advice. If they now decide that they cannot risk any additional log exports, that is not grounds for rescission of the uncompleted portion of any contract. Any such contracts were entered into with full knowledge of the statutes and pendency of the Ninth Circuit case, and in contemplation of the risk that the court would uphold the authority of the State of Alaska (and by clear

inference, the State of Oregon) to impose a prohibition on export.

We referred above to timber on Common School Fund lands. In our opinion OP-5216 of February 19 we said:

> "[T]he State Land Board has ultimate authority to manage the constitutional Common School Fund lands, and that the legislature cannot deprive it of this authority. *If* ORS 526.805 and 526.835 are valid, they are valid because the state owns the logs involved. As applied to constitutional Common School Fund lands, the legislature does *not* have authority to act as owner. The State Land Board has that authority. If applied to those lands, and if so doing would impair the ability of the State Land Board to sell timber on the most advantageous terms, ORS 526.805 and 526.835 would impair the authority of the Land Board to manage. We therefore unequivocally state that these statutes cannot constitutionally be applied to sale of logs from constitutional Common School Fund lands, *if* the Land Board finds that sale for export would be a proper management decision."

We adhere to this conclusion, based upon the Oregon Constitution. The Ninth Circuit decision does *not* affect timber on Common School Fund lands. If the Land Board makes appropriate findings, such timber may be sold for export and exported, and ORS 526.805 and 526.835 do not apply.

Yours Truly,

/s/ Dave Frohnmayer
DAVE FROHNMAYER
Attorney General

DF:JAR:nh